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IN THE

Supreme Court of the United States

October Term, 1957

Number 1022

EVANS MAYO, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

---

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THE STATE OF TEXAS, *Respondent*

Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

---

To the Honorable Chief Justice and the Associates Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered on the 18th day of December, 1957, and confirmed without written opinion on March 5, 1958, on motion for rehearing, affirming the judgment of the County Court at Law, Number Two, of Harris County, Texas.

Opinion Below

The opinion of the Court of Criminal Appeals of the State of Texas which is unreported is printed in the Ap-

pendix, infra, P. 12. The first opinion in this cause by the Court of Criminal Appeals and which was withdrawn in favor of the opinion finally announced is printed in the Appendix, infra, P. 10.

Jurisdiction

The final judgment of the Court of Criminal Appeals was entered on December 18, 1957, second rehearing without written opinion was denied on March 5, 1958. The judgment is printed in the Appendix, infra, P. 9.

The mandate has been stayed for 90 days from March 7, 1958. The order staying the mandate is printed in the Appendix, infra, P. 24.

Jurisdiction is invoked under 28 *U.S.C.*, Section 1257, (3).

Questions Presented

The two questions presented for determination are 1) Whether the petitioner was denied due process of law as contemplated by the due process clause of the 14th Amendment to the Constitution of the United States when in a Criminal case where the accused is charged under an enhancement of punishment statute, which statute does not provide for the procedure to be followed, and a prior conviction, which has been used before in another case to enhance the punishment, is used again for the purpose of enhancing the punishment, if convicted on the primary offense, and 2) Whether the petitioner was denied due process of law under the due process clause of the Constitution of the United States when three prior convictions were alleged in the information, read to the jury prior to

the entry of a plea by the accused, and an attempt was made by the state to prove all three prior convictions, and the jury being charged to the effect that proof of any two of the three prior convictions would be sufficient for the penalty sought.

Statement

The petitioner was accused by an information in the County Court at Law, Number Three, of Harris County, Texas, for the unlawful practice of medicine, paragraph 3 of Article 754a of the *Texas Penal Code*, and the state to enhance the punishment, alleged three prior convictions under the enhancement of punishment statute for misdemeanors, which is as follows:

Art. 61, *Penal Code*, State of Texas, provides as follows:

> "If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, she shall on a second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent conviction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases."

"By various motions and objections, the appellant challenged the right of the state to use the first prior conviction alleged in the information for the purpose of enhancing the punishment, because the state had used the first prior conviction to enhance the punishment as a second offender when he was convicted of the third conviction." This is quoted from the opinion.

Upon the cases being submitted to the jury the petitioner was found guilty and assessed a punishment of a $2,000.00 fine and confinement in jail for a period of six months; which verdict was only proper if the jury had considered the first prior conviction alleged.

On appeal, the Texas Court of Criminal Appeals first reversed the case on the ground that is was improper to use a conviction to enhance punishment more than once. This unofficial and unreported opinion is printed in the Appendix, infra, P. 10.

On rehearing, the Texas Court of Criminal Appeals reversed itself and a long line of decisions and held that it is proper to use a conviction more than once in these enhancement of punishment cases, Judge Morrison dissenting.

On a second motion for rehearing without opinion, Appendix, infra, P. 23; R. 379, on March 5, 1958, the case was affirmed in overruling the motion for rehearing by petitioner.

The order staying the mandate for 90 days from March 7, 1958, was entered on March 7, 1958. R. 381. Printed in Appendix, infra, at P. 24.

How the Federal Question is Presented

In view of the fact that the opinion does not discuss the questions presented in terms of due process of law under the 14th Amendment of the Constitution of the United States, the petitioner would point out under the Court rules, unpublished, of the Texas Court of Criminal Appeals, an issuance of the mandate will not be stayed for time to petition the Supreme Court of the United States for a writ of certiorari, unless the constitutional

question has been presented to the Texas Court; and this was done by the petitioner's supplemental motion for rehearing, R. 333. Pertinent parts are printed in the Appendix, supra. P. 25.

Reasons for Granting the Writ

The United States Supreme Court has not had the occasion to determine if the procedures used in this case by the State of Texas to enhance the punishment in a Criminal cause are fair as that term has been defined when a state procedure is tested against the due process clause of the 14th Amendemnt.

As to the first question at to whether or not a conviction that has already been utilized to enhance the punishment may be used again and again and again, the Texas Court of Criminal Appeals had held prior to this case under the settled law of Texas that a prior conviction may be used once and only once for the purposes of enhancement beginning in 1904 with the case of *Kinney v. State*, 78 S.W. 225, which had this to say:

> "Evidently it was never intended that prior offenses could thus be made to do double duty; that is, prior cases could be used to enhance the punishment in any given cases more than once. To give the statute such an effect would be violative of the principle of former jeopardy, which inhibits a defendant from being convicted more than once for the same offense."

It might be well to point out here that although the double jeopardy clause of the 5th Amendment does not inhibit the states, it does and should serve as a guide and standard as to what is fair criminal procedure.

Only a few other states have considered this problem. In 24 *Corpus Juris Secundum,* Page 1149, in Section 1960, the majority of the cases reported do not allow a conviction to be used more than once.

As to the second question presented, that is the practice in Texas of alleging in the accusation the prior convictions and then reading to the jury the allegations that the accused, as in this case, has previously been convicted three times of the same or similar offense, the petition submits that this basic and fundamental unfairness should be stopped.

The Texas Code of Criminal Procedure or the Texas Penal Code does not provide for any particular in alleging and proving prior convictions. In the case of misdemeanors, Art. 61 of the *Penal Code* provides:

> "If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall on a second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent conviction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases."

There is nothing to prevent the state from alleging prior convictions that cannot be proved, and then reading the accusation to the jury and proving as many as they can.

Note the language used by the Court below in their opinion:

> "But if it be conceded that the judgment relied on to show the third prior conviction is invalid for any reason, then such fact could not here inure to the

benefit of the appellant, for this conviction is not dependent upon the validity of the third conviction."

This is an acknowledgment by the Court that if a prior conviction is alleged then it does not have to be proved, as long as there are other prior convictions alleged that can be proved.

It must be noted, at this point, that this manner of trying persons, previously convicted of serious offenses has not gone unnoticed by other jurists in this Country. In a Pennsylvania case, quoted in 14 *Temple Law Quarterly* 386, *Commonwealth v. Morrow*, 9 Phil. 583, the language used is very emphatic when it declares:

> "To allege in a bill of indictment, charging a man with a high felony that he previously had been convicted of a similar offense would be an anomaly in the administration of the Criminal Law. It would go very far to secure his conviction. It would render his evidence of good character of no practical value.
>
> "That which in other cases is jealously excluded by all rules of evidence, would be here thrown in with most disastrous consequences to the defendant, at a time, too, when of all others, he should have a fair trial."

Here, therefore in the Texas procedure as practice in this case and all Texas cases, we have a situation where the jury is being prepared and primed for the trial of, not an individual charged with a particular crime or offense, but rather of an accused which the allegations say is an "habitual criminal".

These are the conditions in which the petitioner found himself before the trial had commenced. He was already

branded as a three time loser. The elements of "fundamental fairness" is totally disregarded.

The petitioner is not attacking the statute as such, as there must be a curb to the continuous infraction of the laws. But the method should be fair.

Many states, as well as the United States, have provided a fair method of handling the problem of repeat violations; among those being:

California Penal Code, Sec. 1093 (1949);
Nebraska Revised Statutes, Sec. 13744-3 (1938);
Pennsylvania Statutes Annotated, Title 19, Sec. 924 (1930);

The Prevention of Crime Act, (1908) 8 Edward VII, C. 59, Section 10.

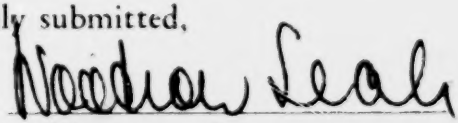
The State of Texas has no standard or guide as the opinion below indicates.

Conclusion

It would appear that the Texas Court of Criminal Appeals erred in affirming the judgment in that the Petitioner was denied a fair and impartial trial in contravention of the due process clause of the United States Constitution.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



WOODROW SEALS
Attorney for Petitioner

APPENDIX

JUDGMENT
CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that Cause No. 29,086, styled

EVANS MAYO, Appellant,

vs

THE STATE OF TEXAS, Appellee

was, on December 18, 1957, affirmed, and former opinion reversing said cause, delivered on October 30, 1957, set aside; Appellant's Motions for Rehearing were overruled, without written opinion, March 5, 1958, and order staying mandate to permit appellant's application for writ of certiorari to the Supreme Court of the United States issued and filed March 7, 1958.

Therefore, this case was disposed of by this Court with the overruling of Appellant's Motions for Rehearing, and mandate would not have been stayed if appellant had not filed a motion to stay such mandate in order to permit the filing of an application for such writ of certiorari.

With the overruling of Appellant's Motions for Rehearing, appellant has exhausted all remedy in this, the Court of Criminal Appeals of Texas and the court of last resort of Texas in criminal cases, and said judgment has become final on the docket of this Court.

WITNESS MY HAND and seal of said Court, at office, in Austin, Texas, this 14th day of May, A. D. 1958.

/s/ Glenn Haynes
Clerk, Court of Criminal Appeals

Seal

EVANS MAYO, *Appellant* §
No. 29,086 § Appeal from Harris County
THE STATE OF TEXAS, §
Appellee §

OPINION

The offense is unlawfully practicing dentistry; the punishment, six months in jail and a fine of $2,000.

The complaint and information alleged that appellant was a person who had been convicted of three misdemeanors, namely the offense of unlawfully practicing dentistry without a license, (1) in Cause No. 23,125 in County Court of Jefferson County at law on June 3, 1946; (2) in the same court on June 23, 1948, in Cause No. 23,948; and (3) in Criminal District Court of Jefferson County in Cause No. 18,579 on June 16, 1952.

The primary offense was alleged to have been committed in Harris County following such convictions, the information alleging that appellant did offer and undertake to make and cause to be made an impression of a portion of the human mouth, jaws and gums of one P. K. Lee for the purpose of constructing and aiding in the construction of a dental appliance, structure and denture, commonly known as false teeth, without first having obtained a license so to do from the Texas State Board of Dental Examiners, signed by all members of said Board and with the official seal of said Board imprinted thereon.

It will be observed that these allegations charge that appellant was engaged in the practice of dentistry as defined in Sec. 3 of Art. 754a V.A.P.C. (as amended in 1951) and that he did so practice without having the license to do so required by Art. 747 V.A.P.C. (as amended in 1953.)

The information was attacked by a lengthy motion to quash, which was overruled and exception reserved.

It is contended that the information is fatally defective because there were no averments that appellant either demanded or received "pay" or other compensation.

The prosecution was for violation of Arts. 747 and 754a, Sec. 3, V.A.P.C., neither of which requires that the person practicing dentistry without a license must receive pay or compensation for his services, before he would be guilty of an offense.

It is true that Art. 748 P.C. (a much older statute) contains a provision regarding "operation pertaining to dentistry for pay - - -," but this prosecution was not for the violation of that statute.

We have concluded that the trial court was in error in permitting the State to use for enhancement of punishment the prior conviction in Cause No. 23,125, and that appellant's rights were prejudiced thereby.

It is well settled by our decisions that under Art. 61 P.C. a prior judgment of conviction of an offense of like character may be used but once for enhancement of punishment. Brown v. State, 150 Tex. Cr. R. 386, 196 S.W. 2d 819, and cases cited.

The information and the judgment of conviction in Cause No. 18,579, also alleged for enhancement of punishment herein, show that the conviction in Cause No. 23,125 was successfully used to enhance the punishment in said Cause No. 18,579.

The state points out that there were two other prior convictions alleged, and suggests that this relieves any error in the allegation and proof as to Cause No. 23,125.

To this we cannot agree. In the motion to quash the information, the attention of the trial court was directed to the prior use of this conviction to enhance the punishment at another trial. The allegation should have been stricken and proof thereof rejected.

For the error mentioned, the judgment is reversed and the cause remanded.

Woodley, Judge.

(Delivered October 30, 1957.)

Evans Mayo, Appellant
No. 29,086, v. —Appeal from Harris County
The State of Texas, Appellee

OPINION

ON STATE'S AND APPELLANT'S MOTIONS FOR REHEARING

On October 30, 1957, we ordered a reversal of this case.

The state and the appellant have each filed a motion for rehearing:

The state contends that the judgment should have been affirmed.

The appellant agrees that the judgment was properly reversed, but insists that we should have gone further and ordered the prosecution dismissed.

Upon further consideration, we have decided that the state's motion for rehearing should be granted and that of the appellant overruled.

Therefore, the opinion heretofore rendered is withdrawn, the reversal is set aside, and the judgment of the trial court is now affirmed in accordance with the following opinion:

This is a conviction for the unlawful practice of dentistry, with punishment assessed at a fine of $2,000 and six months' confinement in jail, enhanced by reason of prior convictions.

The primary offense alleged was that appellant did unlawfully practice dentistry without a license, on or about the 30th day of May, 1956, in Harris County.

It was also alleged that on June 3, 1946, the appellant was convicted in the County Court at Law of Jefferson County, in Cause No. 23125, of the offense of unlawfully practicing dentistry. This will hereafter in this opinion be referred to as the first prior conviction.

It was further alleged that on June 23, 1948, appellant was convicted of the unlawful practice of dentistry, in Cause No. 23948, in the County Court at Law of Jefferson County, Texas. This will be hereafter in this opinion referred to as the second prior conviction.

It was also further alleged that on June 16, 1952, appellant was convicted of the unlawful practice of dentistry, in Cause No. 18579, in the Criminal District Court of Jefferson County, Texas. This will be hereinafter referred to in this opinion as the third prior conviction. The Criminal District Court of Jefferson County has misdemeanor jurisdiction. Art. 52-160, Vernon's C.C.P.

Art. 61, P. C., provides as follows:

> "Second and subsequent conviction for misdemeanor.—If it be shown on the trial of a misdemeanor

> that the defendant has been once before convicted of the same offense, he shall on a second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent conviction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases."

Under the allegations of the information, that statute was invoked and its provisions made applicable when the proof showed that appellant was guilty of the primary offense charged and that he had been convicted of any two of the three prior convictions alleged.

In keeping therewith, the trial court, in his charge, instructed the jury to the effect that if appellant was guilty of the primary offense and had been convicted of any two or all three of the prior offenses alleged his punishment would be not less than $400 nor more than $4,000, or by confinement in jail for any period from four months to forty-eight months, or by both such fine and imprisonment.

The jury were also instructed that in the event they found appellant guilty of the primary offense charged but failed to find that he had been theretofore convicted of as many as two of the prior offenses alleged, then his punishment would be by fine of not less than $100 nor more than $1,000, or by confinement in jail from one month to twelve months, or by both such fine and imprisonment.

Under such charge, the jury returned a general verdict finding appellant guilty, as charged, and assessed his punishment at a fine of $2,000 and confinement in jail for a term of six months.

By various motions and objections, appellant challenged the right of the state to use the first prior conviction alleged in the information for the purpose of enhancing the punishment, because the state had used the first prior conviction to enhance the punishment as a second offender when he was convicted of the third conviction.

In other words, if appellant's contention be tenable, the state, having used the prior conviction one time to enhance punishment as a second offender, was forever barred from thereafter using that conviction for enhancement-of-punishment purposes as a third or subsequent offender

This court has held that when the state uses a prior conviction to enhance the punishment as a second offender it cannot again use that same prior conviction for that purpose. Kinney v. State, 45 Tex. Cr. R. 500, 79 S.W. 570; Miller v. State, 139 Tex. Cr. R. 406, 140 S.W. 2d 859; Cothren v. State, 139 Tex. Cr. R. 339, 140 S.W. 2d 860; McGill v. State, 269 S.W. 2d 398, Tex. Cr. R. .

Evans v. State, 160 Tex. Cr. R. 517, 272 S.W. 2d 732, sustains appellant's contention in that we refused to permit a prior conviction which had been used to enhance the punishment as a second offender to be used to enhance the punishment as a third offender or any subsequent offender. As sustaining that conclusion, the cases above listed were cited.

However, note is taken of the fact that none of those cases carried, as did the Evans case and this case, a conviction as a third offender. So then the holding in the Evans case was not bottomed upon any case directly in point.

Prior to the holding in the Evans case, this court, in Ex parte Calloway, 151 Tex. Cr. R. 90, 205 S.W. 2d 583, held in unmistakable terms that under Art. 63, P. C., "the use of a prior conviction to enhance the punishment as a second offender does not preclude the State from again using that conviction to fix the status of an habitual criminal."

Art. 63, P. C., fixes the punishment authorized to be assessed for one three times convicted of an ordinary felony, while Art. 61, P. C., fixes the punishment authorized to be assessed for one three times convicted of a misdemeanor offense of like character.

In so far as enhancement of punishment by reason of prior convictions is concerned, the legal effect of the two statutes is the same.

The legal question involved in the Evans case and that in the Calloway case is the same. The holding in the two cases is, however, directly contradictory.

The question for our determination, here, then, is: Which case is to stand and which is to fall?

The Evans case, the junior in point of time of pronouncement, did not discuss or directly overrule the holding in the Calloway case. It cannot be said, therefore, that the Evans case constituted an express repudiation of the Calloway case.

In the Calloway case this court—at some length—discussed the cases heretofore mentioned, and therein pointed out that those two cases were not determinative of the question of using a prior conviction that had been used to enhance the punishment as a second offender, for the

purpose of enhancing the punishment as a third offender. As a basis for the conclusion reached, it was pointed out that under Art. 63, P. C., the statute fixing punishment for three-time convictions, two prior convictions were necessary. In that connection it was said:

> "So then, to prosecute one as an habitual criminal the State would of necessity be called upon to forego or waive its rights to proceed against an accused as a second offender when that right presented itself and before the accused had committed and been convicted of the third or subsequent offense. In other words, so long as the State exercised the right to prosecute as a second offender it could never prosecute one as an habitual criminal. Thus is demonstrated the fallacy in relator's contention."

It was also pointed out that the rule announced by the Calloway case was the rule in other jurisdictions.

The opinion on motion for rehearing in Brown v. State, Tex. Cr. R., 196 S.W. 2d 819, announces the same views, wherein it is said:

> "The lack of logic in the rule which we now recognize is exposed by the results which necessarily follow. The appellant may pay the penalty based on the ground that he has been previously convicted twice for a similar offense. Tomorrow he commits the same character of offense and is again brought before the court. All prior convictions having been once used, he can no longer be adjudged an habitual criminal, but stands before the court as a first offender. The payment of the penalty can not change the state of the man. If he is an habitual criminal today and continues his habit by a similar violation tomorrow, after

> having suffered the consequence of the enhanced penalty, he is all the more an habitual criminal. It is only the construction of the statute that relieves him from being thus adjudged. If he should continue day after day to violate the law, every third day he would be an habitual criminal and, if so convicted, on the fourth he would not be such. Or, if the state should use every 'first' conviction to double the penalty in the next one, he could commit the same character of offense day after day, pay the double fine when assessed, and never become an habitual criminal."

It is well to point out, here, that the Brown case, supra, does not support appellant's contention. In that case the prior convictions, while alleged, were not in fact used by the state to enhance the punishment in another case.

The conclusion is reached that the Calloway case is correct and controlling wherein the rule is announced that "the use of a prior conviction to enhance the punishment as a second offender does not preclude the State from again using that conviction to fix the status of an habitual criminal (third offender)."

The Evans case is therefore expressly overruled.

From what we have said, it is evident that the trial court in the instant case did not err in permitting the state to make use of the first prior conviction alleged herein for the purpose of enhancing the punishment, under Art. 61, P. C.

Appellant next contends that the state failed to prove the alleged third prior conviction.

To support that allegation the state offered in evidence the following judgment:

"'The State of Texas	)	Charge - Illegal Practice of
vs.	)	Dentistry
Evans Mayo.	)	No. 18579
	)	Date 6-16-52.'"

"'This day this cause was called for trial, both parties appeared and announced ready for trial, and the defendant, Evans Mayo, pleaded "Guilty" to the information herein, waived a trial by jury and submitted his cause to the Court, who, having heard the Information read, defendant's plea of "Guilty," the evidence submitted and argument of counsel, and, after considering same, finds the defendant, Evans Mayo, guilty of the charge alleged in the Information and assesses his punishment at a fine of ($750.00) Seven Hundred and Fifty Dollars & Costs.

"'It Is Therefore, Considered, Ordered and Adjudged by the Court, that the State of Texas do have and recover of defendant, Evans Mayo, the said fine of ($750) Seven Hundred Fifty Dollars and all costs of this prosecution, and the defendant Evans Mayo, is hereby remanded to the custody of the Sheriff, who will commit him to the jail of said County until said Fine and Costs are paid.

"'And Execution may issue against the property of the defendant for the amount of said fine and costs.'"

"Signed: "'Harold R. Clayton.'"
"'Judge Presiding.'"

In connection therewith, the state offered in evidence the information upon which that judgment rested, which showed that it was presented in the Criminal District Court of Jefferson County, Texas.

The judgment was certified by the clerk of the district court of Jefferson County as being of record in the min-

utes thereof (Criminal District Court of Jefferson County, Texas).

A witness who was present at the trial and conviction, and who signed the complaint upon which the information was based, identified appellant as being one and the same person as the one named in that complaint.

In the light of that proof we are unable to agree with the appellant that the state failed to show that the judgment was rendered in the Criminal District Court of Jefferson County, Texas.

It is contended that the judgment mentioned is invalid upon its face, because in connection therewith the state did not prove that the "Harold R. Clayton" who signed the judgment as "Judge Presiding" was, in fact, authorized to sit as the judge in that case.

There is not a line of evidence in this case showing that Harold R. Clayton was not authorized to enter the judgment.

Appellant urges this court to assume such a fact because Harold R. Clayton was not the regularly elected judge of that court and did not purport to act as such.

In his brief, counsel for appellant sets forth facts which he insists relate to the authority of Harold R. Clayton to act as presiding judge upon the trial.

If appellant had introduced such facts in evidence, they would have been before us for consideration. But as those facts were not introduced and are not before us, we are not authorized to consider them.

The minutes of the court carrying the judgment entered by Harold R. Clayton, Judge Presiding, were approved in open court by O. N. Lord, the regularly elected judge of the Criminal District Court of Jefferson County, Texas.

This approval made the judgment a part of the minutes of the court.

We are unable to agree with the appellant that the evidence failed to show that he had been convicted as alleged in the third prior conviction.

Having pleaded guilty to the accusation, without any suggestion that Harold R. Clayton was not authorized to act as the judge, appellant is not shown, under the circumstances, to be entitled to collaterally attack in this proceeding the judgment of the Criminal District Court of Jefferson County.

But if it be conceded that the judgment relied upon to show the third prior conviction is invalid for any reason, then such fact could not here inure to the benefit of the appellant, for this conviction is not dependent upon the validity of the third conviction.

The verdict of the jury is and can be sustained upon the first and second prior convictions, together with the conviction for the primary offense charged.

The evidence here supports the jury's conclusion that appellant had been twice convicted of the offense of unlawfully practicing dentistry.

In addition to the matters heretofore discussed, appellant challenged the sufficiency of the information in alleg-

ing the primary offense because it charged that he demanded or received pay or compensation for an act claimed to constitute the practice of dentistry.

It is sufficient to point out that under the statutes, Arts. 747 and Secs. (3) of Art. 754a, Vernon's P. C., pay or compensation for services rendered is not an essential element of the offense, and, for that reason, no such allegation was here necessary.

Appellant also contended that the information should have charged that the prior convictions alleged were for offenses of the same character, as specified in Art. 61, P. C.

While it is true that the information did not state, in so many words, that the prior convictions were for the same offense as the primary offense charged, yet in alleging each prior conviction it was charged that the offense for which appellant had been there convicted was that of the unlawful practice of dentistry, which was the offense charged in the information. This was a sufficient complaint, under the statute, Art. 61, P. C.

Other matters discussed in appellant's brief have been considered and are overruled without discussion, here.

The judgment of the trial court is affirmed.

Davidson, Judge

(Delivered December 18, 1957)

Evans Mayo, Appellant
No. 29,086. v. - - - Appeal from Harris County
The State of Texas, Appellee

DISSENTING OPINION

I remain convinced of the soundness of the rule announced in Evans v. State, 272 S.W. 2d 732, and respectfully enter my dissent.

Morrison, Presiding Judge

(Delivered December 18, 1957)

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that in Cause No. 29,086

EVANS MAYO, Appellant,
vs.
THE STATE OF TEXAS, Appellee

Appellant's Motions for Rehearing were overruled, without written opinion, on March 5, 1958.

WITNESS my hand and seal of said Court, this 14th day of May, A. D. 1958.

/s/ Glenn Haynes
Clerk, Court of Criminal Appeals

Seal

Evans Mayo, Appellant,
No. 29,086 v. —Appeal from Harris County
The State of Texas, Appellee.

ORDER STAYING ISSUANCE OF MANDATE

The application of Evans Mayo for a stay of issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the appellant for a period of ninety (90) days from this date in order that he may apply to the Supreme Court of the United States for a writ of certiorari.

And the Clerk is further directed that in the event the writ is granted by the Supreme Court of the United States, the issuance of the mandate be delayed until final action by that Court upon the matter.

This the 7th day of March, A. D. 1958.

/s/ W. A. Morrison
Presiding Judge, Court of Criminal Appeals of Texas

A TRUE COPY
ATTEST:
/s/ Glenn Haynes
Clerk, Court of Criminal Appeals
of Texas

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
MAR. 7, 1958
Glenn Haynes
Clerk

APPELLANT'S SUPPLEMENTAL MOTION FOR REHEARING

. . .

"From what has been said, it is quite clear that the appellant was not tried in the lower Court under the established rules of law prevailing in Texas, and the same is true in reference to the majority opinion of this Court. The procedure adopted in the lower Court, as well as in this Court, in the respects above stated, is diametrically opposed to Article 1, Section 13, and Article 1, Section 19, of the Constitution of Texas. Section 1 of the Fourteenth Amendment to the Constitution of the United States among other things provides "that no State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Since it is quite obvious that appellant was forced to trial in the lower Court under conditions wholly foreign to the laws of Texas and since the majority opinion of this Court on the State's motion for rehearing approves and sanctions the procedure adopted by the lower Court, it is quite obvious that the appellant has, or is about to be, deprived of his liberty without due process of law and has manifestly been denied the equal protection of the law. Therefore, the whole proceedings in the lower Court and in this Court are manifestly repugnant to the Fourteenth Amendment to the Constitution of the United States.

. . .

In view of what has been said under the foregoing point of error, the appellant in this case submits that he simply has not been given his day in Court, either by the trial Court or by this Court. He has been tried under procedure

wholly unknown to the established law of Texas, both procedural and substantive. Therefore, he has been deprived of "due process of law," guaranteed to him under Article 1, Section 13 and Article 1, Section 19, of the Texas Constitution, and under Section 1 of the Fourteenth Amendment to the Constitution of the United States. The specific reasons bearing out appellant's contention in this respect are set forth in the last paragraph in foregoing point of error two appearing on page 12 of this motion. It would serve no useful purpose to repeat that paragraph here, but the same is here referred to and by reference made a part of this argument for all purposes."